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Supreme Court of the United States

October Term, 1948

No. 720

THYS and ALBERT K. MILLER, co-partners doing business as THYS & MILLER,

Petitioners,

vs.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REHEARING

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

ELWOOD HUTCHESON
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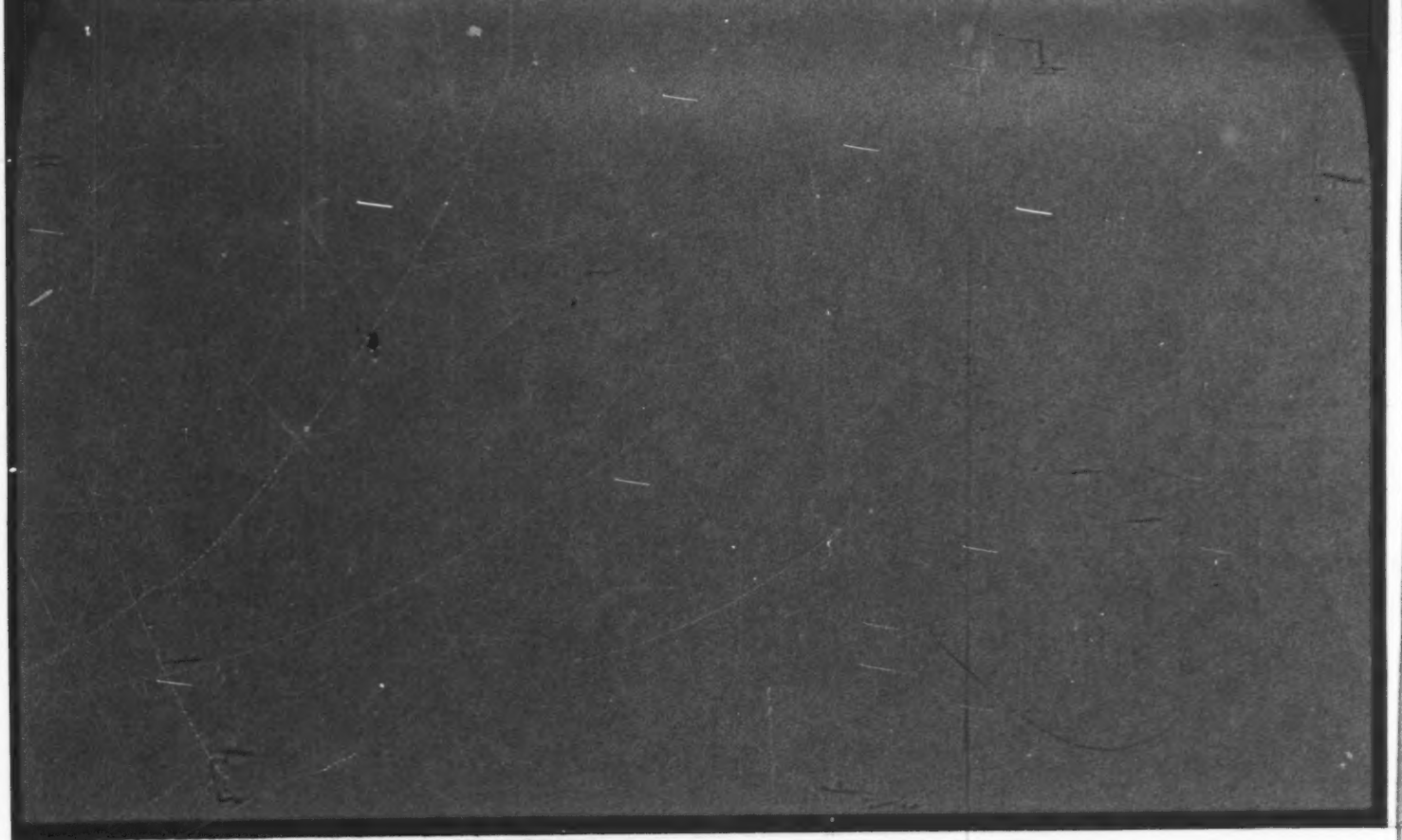

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SUBJECT INDEX

	Page
The judgment is final and appealable	2
Substantial federal questions are involved	11
Interstate commerce	13
Taxability of patent royalties	16
Not doing business in Washington	18
Conclusion	20
Certificate	20

TABLE OF CASES

Brady v. Terminal Railroad Assn., 302 U. S. 678, 81 L. Ed. 523, Ibid, p. 367, (footnote 62)	10
Bruce v. Tobin, 245 U. S. 18, 62 L. Ed. 123	4
Bruner v. Moline Plow Co., (CCA) 168 Fed. 218	20
Buob v. Feenaughty Machinery Co., 4 Wn. 2d 276, 103 P. 2d 325	11
Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. Ed. 1001	7
Clark v. Williard, 292 U. S. 112, 118, 78 L. Ed. 1160, 1164, 54 S. Ct. 615	10
Cole v. Violette, 319 U. S. 581, 87 L. Ed. 1599	10
Davis v. Davis, 16 Wn. 2d 607, 134 P. 2d 467	11
Dept. of Banking v. Pink, 317 U. S. 268, 87 L. Ed. 257	10
Driver's Union v. Meadowmoore, 312 U. S. 287	10
First Bank Stock Corp. v. Minnesota, 300 U. S. 635, 301 U. S. 234	11

Page

Freeman v. Hewit, 329 U. S. 249, 91 L. Ed. 265 14

Grays Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U. S. 251, 61 L. Ed. 702 ..... 3, 6

Gulf Refining Co. v. U. S., 269 U. S. 125, 136, 70 L. Ed. 195 ..... 4, 9

Hood v. DuMond, U. S., 93 L. Ed. (Adv. Op.) 682 15

Knox Natl. Farm Loan Assn. v. Philips, 300 U. S. 194, 81 L. Ed. 599 10

LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, U. S., 91 L. Ed. (Adv. Op.) 265, 268 .. 10

Market Street Ry. Co. v. Railroad Commission, 324 U. S. 548, 89 L. Ed. 1171 8

McLeod v. Dilworth Co., 322 U. S. 327, 88 L. Ed. 1304 14

Miller v. Sisters of St. Francis, 5 Wn. 2d 204, 105 P. 2d 32 .. 11

Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, quoted in annotation 89 L. Ed. 1189 ..... 4, 9

Newport Co. v. Wisconsin Tax Commission, 219 Wis. 293, 261 N. W. 884, 100 A.L.R. 1204, cert. denied, 297 U. S. 720, 80 L. Ed. 1004 16

Parker v. Illinois, 333 U. S. 571, 92 L. Ed. 886 10

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 89 L. Ed. 2095 5

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 91 L. Ed. 80 6

Rio Grande Western R. Co. v. Stringham, 329 U. S. 44, 60 L. Ed. 136 10

Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47, 50, 83 L. Ed. 34, 36 1

Page

State ex rel Grays Harbor Logging Co. v. Superior Ct., 100 Wash. 485, 491, 181 Pac. 238, 241 11

Tippecanoe County v. Lucas, 93 U. S. 112, 23 L. Ed. 822 10

Tucker v. Brown, 20 Wn. 2d 740, 773, 150 P. 2d 604, 622 11

U. S. v. American Bell Telephone Co., 29 Fed. 17 19

Wagner v. Meaker, (CCA) 92 Fed. 76 20

OTHER CITATIONS

14A C. J. 1278, sec. 3984 20

Boskey, "Finality of State Court Judgments Under the Federal Judicial Code," 43 Col. Law Rev. 1002, 1007 4

20 C. J. S. 51, 52, sec. 1835, 1836 20

10 Cyclopedia of Federal Procedure (2d ed.) 369, sec. 4976 10

17 Fletcher Cyc. Corp. (Perm. Ed.) 542, sec. 8492 20

Rem. Rev. Stat. Supp., sec. 8370-199, as amended by Laws of 1939, ch. 225, sec. 29 9

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PETITION FOR REHEARING OF PETITIONERS

Petitioners respectfully petition this Honorable Court for a rehearing herein, and urge that the cause be reconsidered and that the petition for writ of certiorari be granted and the judgment reversed.

This petition for rehearing is based upon other substantial grounds available to petitioners although not previously presented. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50. 83 L. Ed. 34, 36.

We assume that the decision of this Court denying the petition for writ of certiorari was based upon one or more of the alleged grounds for such denial urged in respondent's brief. Petitioners had prepared the reply brief thereto,

but unfortunately the decision was filed prior to the filing of said reply brief. This case is extremely important both to the parties and to the public by reason of the extremely important nature of the questions involved. The grounds and points urged in respondent's brief were not previously presented or discussed in our petition or our opening brief. We therefore deem it extremely important that the following matters be brought to the attention of this Court before there is a final determination herein.

1. THE JUDGMENT IS FINAL AND APPEALABLE.

Respondent's first contention (p. 9) that there is not a final appealable judgment, was not presented or discussed in our petition or opening brief.

We submit, however, that this is a final appealable judgment. Manifestly all of the legal and factual questions herein have heretofore been fully and finally determined in the state courts. The only possible purpose of a remand to the trial court—which has not been requested or desired by either party—would be for a mere mathematical computation (or at the most accounting) to determine exact amount of taxes due, if any. There is no additional evidence to introduce. There is no intention of or remand for a new trial.

Respondent quotes a law review article by one Boskey

(43 Col. L. Rev. 1002, 1009) that a state supreme court judgment is not final when it remands the case for an accounting. However, as hereinafter pointed out, *this Court has subsequently held to the contrary.*

We have examined the authorities cited by respondent and find that none of them is in point.

Grays Harbor Logging Co. v. Coates-Fordney Logging Co., 243 U. S. 251, 61 L. Ed. 702, merely held that an interlocutory order of use and necessity in a condemnation proceeding was not a final appealable judgment until judgment had been entered after a trial as to the amount of damages. The award of damages was held to be necessarily a condition of the right to take the property. As there pointed out, such an interlocutory order under the state law was not even a final judgment appealable to the state supreme court. In effect this is one of the "new trial" cases, as a further entire jury trial was necessary to determine the amount of damages. There had been no trial or hearing whatever pertaining to damages. The state constitution and statutes prohibited the transfer of the condemned property until after the compensation had been determined and paid. Thus the issue of the right to take was necessarily dependent for final resolution on the determination of the amount of compensation. The controversy was not severable into distinct phases. The case is obviously clearly distinguishable.

Boskey, "Finality of State Court Judgments under the Federal Judicial Code," 43 Col. Law Rev. 1002, 1007, states the reason for the Grays Harbor decision:

> "In the subsequent hearing on assessment of damages, new federal questions could arise, which would force the Supreme Court to review the case piecemeal if it were to assume jurisdiction upon a mere order for condemnation."

Of course, there is not the slightest possibility of that occurring in this case.

The portion of the Boskey article quoted by respondent has been overruled by this Court in the Johnson case hereinafter quoted. Moreover, the instant case comes directly within Boskey's qualification (by footnote) to the statement quoted by respondent:

> "*A different question would be presented if the judgment settled the rules governing the measure of damages and the record contained all the data necessary for ascertaining the ultimate amount, so that nothing remained to be done but the ministerial duty of making the indicated arithmetical computation. Such a judgment might well be final* under the rule of *Mower v. Fletcher,* 114 U. S. 127 (1885) . . . *Cf. Gulf Refining Co. v. United States,* 269 U. S. 125, 136." (All italics are ours).

Likewise, in *Bruce v. Tobin,* 245 U. S. 18, 62 L. Ed. 123, the state supreme court decision reversed a judgment of dismissal and remanded the case for *a new trial.* There had been no determination whatever as to the amount of

recovery. This case likewise is one of the new trial cases and is not at all in point here.

This case comes directly within the recent decision of this Court in *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 89 L. Ed. 2092, where this court overruled a challenge to its jurisdiction even though the state supreme court, which was reversed on certiorari, not only directed delivery of certain property, *but also ordered the case remanded to the trial court for an accounting.* The decision of this court upon this question was unanimous. Mr. Justice Frankfurter, speaking for this Court, said:

> "The problem of determining when a litigation is concluded so as to be 'final' to permit review here arises in this case because, as has been indicated, the Nebraska Supreme Court not only directed a transfer of property, *but also ordered an accounting of profits from such property.* . .
>
> "In short, the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and *is to be deemed disassociated from a provision for an accounting even though that is decreed in the same order.* In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled. . . .
>
> "That presumption in allowing such review is that *the Federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise*

to a Federal question. Of course, where the remaining litigation may raise other Federal questions that may later come here, such as is true of eminent domain cases, see *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.* (Washington ex rel. Grays Harbor Logging Co. v. Superior Ct.) 243 U. S. 251, 61 L. Ed. 702, 37 S. Ct. 295, to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews."

We sincerely believe and respectfully submit that the foregoing decision of this Court is conclusive. There is not the slightest question but that all of the federal questions that could come here have been heretofore adjudicated by the state supreme court. The mathematical computation, if any, (or the accounting, if any) which remain "*could not remotely give rise to a Federal question.*" The Johnson case is directly in point and decisive of this question here.

Also directly in point and conclusive is the recent unanimous (on this question) decision of this Court in *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 91 L. Ed. 80. The California supreme court had ordered the judgment reversed. Under the California law, where the judgment is reversed without directions, as in that case, there is a new trial. This Court, however, overruled the jurisdictional objection, reversed the state supreme court judgment, and held that the taxpayer was entitled to recover a refund of the state retail sales tax illegally assessed. Mr. Justice Douglas, speaking for this Court, said:

"The question is whether it can be said that 'there is nothing more to be decided' (Clark v. Williard, 292 U. S. 112, 118, 78 L. Ed. 1160, 1164, 54 S. Ct. 615), that there has been 'an effective determination of the litigation.' (Citing cases). That question will be resolved not only by an examination of the entire record (Clark v. Williard (U. S.) supra) but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. (Citing cases). . . .

"The claim thus frames and restricts the issues for the litigation. Although the Supreme Court reversed the judgment of the trial court without direction, its decision controls the disposition of the case. (Citing cases). Since the facts have been stipulated and *the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided.* The jurisdictional objection is thus without merit."

In *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U. S. 362, 58 L. Ed. 1001, in accepting jurisdiction and reversing a state supreme court decision which remanded the case for an accounting and for certain further proceedings, this Court said:

"The claims of the state to a triangular strip of ground hereafter mentioned, or to the proceeds thereof, or to any other property, movable or immovable, not appurtenant to the waterway and roadways, were reserved for further adjudication in the proceedings. And *an accounting was ordered* of the receipts and disbursements in the management of the property since March 10, 1908, and *the case was remanded to the district court for further proceedings* on all questions reserved as above stated, and 'that the right of

the plaintiff to obtain judgment for such amount as may be found due upon defendant's accounting, and to take such further orders as may be required for the execution of this judgment, be reserved.'

". . . . That is, all was decreed that it was the purpose of the suit to have decreed, and which not only constituted its success, but *which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality.* Is it not as well in form? . . .

"In the case at bar *there is distinct and explicit finality,* and the further proceedings are directed to apply only to the 'questions reserved.' . . . The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained."

This case also comes directly within the rule as recently stated by Mr. Justice Jackson rendering the unanimous decision of this Court in *Market Street Ry. Co. v. Railroad Commission,* 324 U. S. 548, 89 L. Ed. 1171:

"Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

". . . . *The judgment for our purposes is final when the issues are adjudged . . . . Our test is a practical one. When the case is decided, the time to seek our review begins to run.*"

The state statute governing the procedure in an action of this nature (Rem. Rev. Stat. Supp. sec. 8370-199, as amended by Laws of 1939, ch. 225, sec. 29) is quoted at page 45 in the appendix to our opening brief. Under this statute there is no occasion whatever for any new trial nor any further proceedings, aside from the mere mathematical computation and ministerial act of entering judgment pursuant to the supreme court decision, unless reversed.

In *Mower v. Fletcher*, 114 U. S. 127, 29 L. Ed. 117, quoted in annotation, 89 L. Ed. 1189, this Court held that it had jurisdiction where the state supreme court reversed the judgment with directions to enter a certain judgment in favor of the plaintiff. This court said:

> "The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court, which has been rendered, into execution. Nothing is left to the judicial discretion of the court below."

In *Gulf Refining Co. v. U. S.*, 269 U. S. 125, 136, 70 L. Ed. 195, this Court said:

> "The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulation. (Citing cases) . . . Nothing remains but the ministerial duty of entering a decree for the precise sums which had

been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit."

10 Cyclopedia of Federal Procedure (2d ed.) 369, sec. 4976, (cited by respondent) states:

"*However, the mere remand for further proceedings as to certain specific questions of a minor and collateral nature does not deprive the judgment of the requisite finality where, as to the major questions involved, including the federal questions, the judgment has a distinct and explicit finality in substance and form.*"

"*Where a judgment of the highest court of a state is final under decisions of that court, the Supreme Court of the United States treats it as final. Brady v. Terminal Railroad Assn.*, 302 U. S. 678, 82 L. Ed. 523." Ibid, p. 367, (footnote 62).

See also to the same effect:

LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, U. S., 93 L. Ed. (Adv. Op.) 265, 268 (decided January 17, 1949); *Parker v. Illinois*, 333 U. S. 571, 92 L. Ed. 886; *Dept. of Banking v. Pink*, 317 U. S. 268, 87 L. Ed. 257; *Cole v. Violette*, 319 U. S. 581, 87 L. Ed. 1599; *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44, 60 L. Ed. 136; *Clark v. Williard*, 292 U. S. 112, 78 L. Ed. 1160; *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Knox Natl. Farm Loan Assn. v. Philips*, 300 U. S. 194, 81 L. Ed. 599; *Brady v. Terminal Railroad Assn.*, 302 U. S. 678, 303 U. S. 10; *Driver's Union v. Meadowmoore*, 312 U. S. 287;

First Bank Stock Corp. v. Minnesota, 300 U. S. 635, 301 U. S. 234.

This judgment is final under the decisions of the state supreme court of Washington, and states "the law of the case" which is binding upon all state courts in the same proceedings.

Tucker v. Brown, 20 Wn. 2d 740, 773, 150 P. 2d 604, 622; *Davis v. Davis*, 16 Wn. 2d 607, 134 P. 2d 467; *Miller v. Sisters of St. Francis*, 5 Wn. 2d 204, 105 P. 2d 32; *Buob v. Feenaughty Machinery Co.*, 4 Wn. 2d 276, 103 P. 2d 325; *State ex rel Grays Harbor Logging Co. v. Superior Ct.*, 100 Wash. 485, 491, 171 Pac. 238, 241.

The judgment of the state supreme court fully determines all questions herein, including the federal legal questions now presented to this Court, and the same is a final appealable judgment under both the Federal and state decisions, and is clearly subject to review by writ of certiorari in this Court. A holding to the contrary would be grossly unjust, unsound, and unjustifiable.

2. SUBSTANTIAL FEDERAL QUESTIONS ARE INVOLVED.

Respondent's suggestion (p. 11) that this controversy involves only the proper method of computation of admitted taxes is wholly erroneous. The state sales tax and occu-

pation tax are entirely inapplicable to these patent royalties payable to non-residents of Washington, who are not doing business in said state, and arising out of interstate commerce transactions.

Respondent assumes, but there is no evidence which proves, that there is an "arbitrary segregation" by petitioners of the consideration payable. The selling price of these machines covered the cost of manufacture, and Lindeman's profit, plus petitioners' profit on the selling price. A patentee has a lawful right to make an additional charge of royalties for the use of patented machinery. That was all that was done here. This is not a mere matter of form, but relates to the fundamental substance of these transactions.

Any question of abuse can be met in the future when such case arises. Certainly it cannot be reasonably contended that there was any abuse, bad faith, or unlawful tax evasion in this instance. The testimony establishing the good faith of petitioners is clear, positive, and undisputed. (R. 23).

Under the state statute, quoted at page 41 of our opening brief, the ¼% business and occupation tax, if applicable, is payable by the seller or manufacturer. Petitioners have never understood or construed any of their contracts to mean that the purchasers were liable therefor, contrary to the express terms of the state statute.

And as to the 3% sales tax, this has never been collected as to the patent royalties by petitioners from any of the machine users. We must therefore assume that the loss, if any, must fall on petitioners.

As hereinabove stated, these are not "admittedly applicable state statutes." As to royalties, the statutes are not applicable at all.

Each of the four questions involved here is undoubtedly a substantial federal question.

3. INTERSTATE COMMERCE.

The admitted facts that the machines were manufactured in Washington and the purchasers resided there are in no way controlling. These were undoubtedly interstate sales and interstate commerce transactions, in view of the undisputed facts that: (1) every sales and license contract was executed by petitioners in California at their sole office at Sacramento, (R. 20-1, 44, 86, 93); and (2) substantial parts (over 15%) of the machines were manufactured by petitioners at their Sacramento plant and shipped from California to the Lindeman plant at Yakima, Washington, where they became component parts of the finished machines. (R. 14-6, 29, 33, 36-7, 39-42, 47, 88, 91-2).

Each of the cases cited by respondent (p. 14-15), sev-

eral of which were only short *per curiam* decisions, was held to involve local intrastate sales rather than interstate sales, as in each case the taxpayer was either incorporated or authorized to do business as a foreign corporation in the taxing state, had an office and numerous sales agents there, and in each case made the sale and delivery from said local office and collected payment there. These cases are therefore clearly distinguishable. They are fully distinguished in the later cases, *Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, and *McLeod v. Dilworth Co.*, 322 U. S. 327, 88 L. Ed. 1304.

As the instant case involves a ¼% business and occupation tax and a 3% sales tax, under titles 2 and 3 of the state Revenue Act, the former being expressly required by law to be payable by the seller, and does not involve a use tax, it is superfluous for us to discuss the use tax cases cited by respondent, except to say that they involved local intrastate sales by companies having local offices in the taxing states, as in the sales cases hereinabove referred to.

The court will note that none of the cases cited by respondent relate to a tax directly and solely upon the seller in interstate sales, such as especially involved in this ¼% occupation tax. The state statute requires it to be paid by the seller.

Moreover, as to the 3% sales tax petitioners must bear

the loss, if there is any, as they have never collected the same on these patent royalties from any machine users.

We wish to emphasize that in any event this judgment should be reversed as to the ¼% business and occupation tax. This is expressly stated in the statute to be a tax on the privilege of doing the (interstate) business. This same Washington tax statute has been three times held unconstitutional by this Court under the Commerce Clause in cases involving interstate sales of the same nature. *Respondent has not cited a single case involving a tax of this nature.* A denial of this writ cannot be reconciled with the Fisher, Puget Sound, and Gwinn decisions of this Court.

If taxable in Washington, these patent royalties are taxable not only by the Federal Government, but also by California and Oregon. These interstate sales would thus be subject to the intolerable, unjust and unconstitutional burden of multiple taxation. *This is a direct unapportioned tax on the seller's gross receipts of sales in interstate commerce,* and hence is clearly unconstitutional.

See also the decision of this Court filed since the preparation of our petition, in *Hood v. DuMond,* U. S. 93 L. Ed. (Adv. Op.) 682, decided April 4, 1949, reversing the New York state court and holding the state statute as applied is an unconstitutional restriction on interstate commerce.

4. TAXABILITY OF PATENT ROYALTIES.

Respondent seeks to distinguish *Newport Co. v. Wisconsin Tax Commission,* 219 Wis. 293, 261 N. W. 884, 100 A.L.R. 1204, cert. denied, 297 U. S. 720, 80 L. Ed. 1004, on the ground that there the company sold patent rights, whereas here petitioners sold patented machines. This, however, is an attempted distinction without a difference. These patent royalties constitute income derived solely from certain *intangible* property, namely, patents issued by the United States Government. To tax petitioners thereon outside of the state of their domicile, California, is to deprive them of property without due process of law in violation of the Fourteenth Amendment. It was directly so held in the Newport case and other authorities therein cited.

The contract provision as to minimum patent royalties is:

> "In any event, the minimum royalty payable hereunder shall be Five Hundred Dollars ($500) per machine per annum . . . *provided, that if it shall be impossible, in the fair and reasonable judgment of Party of the First Part (Thys) to use any such machine during any part of a particular picking season because of a serious breakdown or breakdowns of a machine,* occurring notwithstanding the exercise of reasonable care on the part of the user or users thereof, *an equitable adjustment shall be made of the amount of minimum royalty payable on such machine for such picking season, based upon the number of days during which such machine*

cannot be used bears to the total number of days in the normal picking season." (Pltf. Ex. 8; R. 17, 18).

The agreement in this respect is conditional and contingent and is not definite or certain. In case of serious breakdown of a machine, not even the minimum royalty is payable.

Why should petitioners be required to pay federal income tax, in addition to California state taxes, upon the entire royalties as taxable income, and also be required to pay state sales tax and occupation tax to the State of Washington on the theory that the same is not income but is part of the gross selling price of the machines? The two are utterly contradictory. This conflict and multiple taxation can be avoided only by a decision of this Court.

The evidence is undisputed that in each instance the purchase price was fully paid and title to the machine passed to the purchaser either prior to or at the time of delivery. Each contract so provided. Other than the suspicion of counsel, there is no evidence whatever indicating any bad faith or fraudulent intent to evade taxes. The evidence is undisputed as to petitioners' entire good faith in these transactions. (R. 21-23, 44, 98; Pltf. Ex. 8).

Respondent has emphasized certain portions of the state supreme court decision referring to the $500.00 annual minimum royalty per machine. Numerous other portions

of the majority opinion, however, indicate that said decision was intended to apply to all royalties, rather than merely the minimum royalties. (R. 121, 125, 129-130).

> *If respondent is right, it would be impossible to know the amount of the selling price at the time of the sale. No one knows then what the machine will do in future years.*

5. NOT DOING BUSINESS IN WASHINGTON.

Respondent makes the surprising contention that petitioners have conceded they are doing business in Washington and conceded their liability for these taxes, but are disputing only the amount. Nothing could be more erroneous. The mere fact that petitioners are not herein presenting any question as to the tax on the cost and profit of manufacturing and the original selling price certainly does not mean that petitioners concede liability for any tax whatever on these patent royalties.

The manufacture of the machines was carried on by Lindeman Power Equipment Company, which was clearly an independent contractor, over whose operations petitioners had no control or right of control whatever. This conclusion is not altered by the fact that petitioners made certain financial loans and advances to assist Lindeman in financing its operations. That was the sole function of the bank account maintained in Washington, from which *with-*

drawals could be and were made from time to time by Lindeman.

The Yakima bank account was clearly a mere matter of practical convenience in financing Lindeman in manufacturing the machines.. (R. 37, 49). In effect these were loans made by petitioners to Lindeman to finance its manufacturing operations. (R. 87). Lindeman admitted that it commingled the proceeds of this bank account with its own funds. They were at all times treated as one and the same. (R. 90).

The machines were delivered to the purchasers as soon as completed. Petitioners never at any time owned any completed machines, parts, or stock of merchandise in this state. Clearly petitioners were not doing business in the State of Washington. See *U. S. v. American Bell Telephone Co.*, 29 Fed. 17, and the cases cited at pages 37 and 38 of our opening brief.

This conclusion is not altered by the fact that William Gamache, a large scale hop producer, to whom petitioners owed a debt of gratitude because he first successfully used these machines in this state, was paid for making arrangements with a local attorney to collect royalties and forward the same to petitioners in California. Collection of such indebtedness, it is well settled, does not constitute doing business in Washington.

20 C. J. S. 51, 52, sec. 1835, 1836, and cases cited; *14A C. J.* 1278, sec. 3984; *17 Fletcher Cyc. Corp.* (perm. ed.) 542, sec. 8492, and cases cited; *Bruner v. Moline Plow Co.*, (CCA) 168 Fed. 218; *Wagner v. Meakin*, (CCA) 92 Fed. 76.

Petitioners were therefore clearly not doing business in the State of Washington and are not lawfully subject to these claimed taxes.

CONCLUSION

We therefore respectfully submit that there is no merit in any of respondent's contentions, that the state court judgment is final and appealable, that numerous substantial federal questions are involved, that this petition for rehearing and petition for the writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted,

ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioners

CERTIFICATE

The undersigned attorneys for petitioners herein hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the same is restricted to other substantial grounds available to petitioners although not previously presented.

ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioners